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Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

RALPH DAVIS, individually, CHESTER BLAKEMORE, officially as the Director of the Department of Highway Safety and Motor Vehicles; and J. Eldredge Beach, individually and as Director of the Florida Highway Patrol, Department of Highway Safety and Motor Vehicles, Appellants,

v.

GREGORY SCOTT SCHERER, Appellee.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

JURISDICTIONAL STATEMENT AND APPENDIX

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QUESTIONS PRESENTED

1. Whether the provisions of Chapter 110, Florida Statutes (1981), which relate to post-termination hearings, and its implementing rules, are unconstitutional.

2. Whether the violation of state law abrogates the defense of good faith immunity when the conduct in question does not violate clearly established federal constitutional law.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT	1
OPINIONS BELOW	1
JURISDICTION	2
STATUTES AND REGULATIONS	4
STATEMENT OF THE CASE	7
THE QUESTIONS ARE SUBSTANTIAL	13
CONCLUSION	29
CERTIFICATE OF SERVICE	30
APPENDIX	1a

TABLE OF AUTHORITIES

CASE	PAGE
Alsbury v. United States Post Office, 530 F.2d 852 (9th Cir. 1976), cert. den., 429 U.S. 828 (1977)	19
Balsecki v. City of Durham, North Carolina, 456 F.2d 87 (4th Cir. 1972), cert. den., 409 U.S. 912 (1973)	16
Barry v. Barchi, 443 U.S. 55 (1979)	19, 20
Blackford v. Maryland Autombile Insurance Fund, 532 F.Supp. 24 (D. Md. 1981)	19
Butz v. Economou, 438 U.S. 478 (1978)	23, 27
Caswell v. Califano, 538 F.2d 9 (1st Cir. 1978)	18
Ciechon v. City of Chicago, 634 F.2d 1055 (7th Cir. 1980)	18
Clanton v. Orleans Parish School Board, 649 F.2d 1084 (5th Cir. 1981)	24
Cornelius v. Minter, 395 F.Supp. 616 (D.C. Mass. 1974)	18

Crowder v. Lash,
687 F.2d 996 (7th Cir. 1982) 24

Davis v. Williams,
617 F.2d 1100 (5th Cir. 1980),
cert. den., 449 U.S. 937 (1981) 17

Golden v. Zwickler,
394 U.S. 103 (1969) 14

Harlow v. Fitzgerald,
___ U.S. ___, 102 S.Ct. 2727,
73 L.Ed.2d 396 (1982) 20, 21, 22, 23, 25, 28

In re Evans,
452 F.2d 1239 (D.C. Cir. 1971),
cert. den., 408 U.S. 930
(1971) 17

Jackson v. State of Mississippi,
44 F.2d 1142 (5th Cir. 1981) 24

Jihaad v. O'Brien,
45 F.2d 556 (6th Cir. 1981) 24

Jordan v. United Insurance
Co. of America,
289 F.2d 778 (D.C. Col. 1961) 18

Mazaleski v. Harris,
481 F.Supp. 696 (S.D. D.C. 1979) 15

Murphy v. Hunt,
455 U.S. 478 (1982) 15

North Carolina v. Rice,
404 U.S. 244, 246 (1971) 15

O'Shea v. Littleton,
414 U.S. 488 (1974) 15

Procunier v. Navarette,
34 U.S. 555 (1977) 23, 25

Scheuer v. Rhodes,
416 U.S. 232 (1974) 22, 23, 24

Thomson v. Bass,
616 F.2d 1259 (5th Cir. 1980),
cert. den., 449 U.S. 983, (1980) 18

United States Parole Commission v. Geraghty,
445 U.S. 388 (1980) 15

Wood v. Strickland,
420 U.S. 308 (1975) 21, 22, 23

FLORIDA ADMINISTRATIVE CODE

Section 22M-2.08 5

FLORIDA STATUTES

Chapter 110 (1981) 2, 10, 11, 13, 14, 16

Section 110.061, (1977) 9, 10, 18

Section 110.309, (1981) 4

UNITED STATES CODE

28 U.S.C. §1254(2)	3
28 U.S.C. §1291	2
28 U.S.C. §1331	2
28 U.S.C. §1343	2
42 U.S.C. §1983	2, 27

UNITED STATES CONSTITUTION

First Amendment	9
Ninth Amendment	9

OTHER

Rule 25 Affirmance Court of Appeals for the Eleventh Circuit	1, 2, 11

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The original Memorandum Opinion and Order of the United States District Court for the Northern District of Florida which appears in the appendix hereto, p. 1a, infra, is reported at 543 F.Supp. 4 (N.D. Fla. 1981). The Order Amending Judgment appears in the appendix hereto, p. 62a, infra.

The Rule 25 affirmance of the Court of Appeals for the Eleventh Circuit is reprinted in the appendix hereto, p. 83a, infra. The denial of Appellants' Petition for Panel Rehearing by the Court of Appeals for the Eleventh Circuit is reprinted in the appendix hereto, p. 85a, infra.

JURISDICTION

Appellants appeal the Rule 25 affirmance of the United States Court of Appeals for the Eleventh Circuit which was based on the opinion of the district court. Such opinion held Chapter 110, Florida Statutes (1981), and its implementing rules, unconstitutional in regard to post-termination procedures. It further held that Appellants were not entitled to the defense of good faith immunity.

Jurisdiction in the district court was predicated upon 42 U.S.C. §1983 and 28 U.S.C. §§1343 and 1331. Jurisdiction in the appellate court was predicated on 28 U.S.C. §1291.

The judgment of the Court of Appeals for the Eleventh Circuit was entered on June 30, 1983. A Petition for Panel Rehearing was entertained and denied on August 22, 1983. See p. 85a, infra.

A Notice of Appeal to this Court was duly filed in the Court of Appeals for the Eleventh Circuit on August 31, 1983. See p. 87a, infra.

This appeal is being docketed in this Court within 90 days from the denial of the Petition for Panel Rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(2).

STATUTES AND REGULATIONS

Section 110.309, Florida Statutes (1981):

110.309 Procedure with respect to suspensions and dismissals.-

(1) A permanent employee in the State Career Service System who is suspended or dismissed by an agency or officer shall be entitled to a de novo fact-finding hearing. Such hearing shall be conducted by the commission itself, unless otherwise provided for by law.

(2) Upon a finding that just cause existed for the suspension or dismissal, the commission shall affirm the suspension or dismissal.

(3) Upon a finding that just cause did not exist for the suspension or dismissal, the commission may order the reinstatement of the employee, with or without back pay.

(4) Upon a finding that just cause for disciplinary action existed, but did not justify the severity of the action taken, the commission may, in its discretion:

(a) Reduce a dismissal to a suspension for such time as the commission may fix; or

(b) Reduce the period of a suspension.

(5) Any order of the commission issued pursuant to subsection (3) or subsection (4) shall be conclusive on the agency or officer concerned. The order may include an amount, to be determined by the commission and

paid by the agency, for reasonable attorney's fees, witness fees, and other out-of-pocket expenses incurred during the prosecution of an appeal against an agency in which the commission sustains the employee.

Section 22M-2.08, F.A.C.:

22M-2.08 Setting Appeal for Hearing.

(1) Either party may file a motion showing that discovery is complete and that an appeal is ready to be set for hearing. Upon the filing by either party of a motion to set an appeal for hearing, the appeal shall be set on the hearing docket within 30 days. The Commission shall hear all appeals as scheduled on the docket within a geographic area, as the Commission's travel schedule permits. The Commission reserves the right, within the group of hearings set for given dates, to hear cases out of docket order, to make the best use of its available hearing time.

(2) Time for appeal hearings shall be allotted to appeals according to the circumstances of each particular appeal.

(3) Unless otherwise stipulated by the parties, at least fourteen days' notice of the hearing shall be given.

(4) An appeal hearing may be held without the presence of the appealing party upon proof of notice of hearing having been properly

given to the appellant. A default shall not be entered in any appeal and the agency shall be required to present a prima facie case in support of the allegations upon which the agency action was taken.

(5) Except in instances where good cause is shown, motions for continuance must be filed not later than five calendar days after receipt of notice of the hearing, and shall be granted solely in the discretion of the Commission or its presiding officer. Motions for continuance will be granted only in cases of extreme emergency.

STATEMENT OF THE CASE

Appellee was employed in 1975 with the Florida Highway Patrol, a division of the Florida Department of Highway Safety and Motor Vehicles. In August, 1977, while an employee of the Florida Highway Patrol, Appellee took a second job as an auxiliary deputy with the Escambia County Sheriff's Office.

Due to Department regulations, it was incumbent upon Appellee to secure permission from his supervisors to hold secondary employment. Appellee sought approval which was initially erroneously granted and subsequently withdrawn due to the potential for conflict which might arise in working for two separate law enforcement agencies.

The reasons for the disallowance of Appellee's request for dual employment were explained to him orally and in

writing. However, Appellee continued to work as an auxiliary deputy, despite repeated requests that he resign his secondary position in accordance with Department rules. Appellee was ordered in writing to terminate his second job, but he refused to do so. By certified letter dated October 24, 1977, Appellee was terminated from his position with the Florida Highway Patrol due to his failure to comply with the dual employment policy.

As was his right, see p. 4, supra, Appellee appealed his dismissal to the Florida Career Service Commission. Prior to the scheduled Career Service hearing, Appellee settled his claim and received back pay, reinstatement and other benefits. Appellee was reinstated to his former position with the Florida Highway Patrol. Appellee then volun-

tarily resigned his position with the Florida Highway Patrol.

Appellee filed suit in the District Court for the Northern District of Florida alleging a denial of procedural due process and a denial of the First and Ninth Amendment right to privacy. Appellee specifically raised the question of the constitutionality of section 110.061, Florida Statutes (1977) (the statute in effect at the time), and its implementing rules and regulations, in his Amended Complaint. As one of their defenses in answer to Appellee's Amended Complaint, Appellants raised the defense of good faith immunity, asserting that all their actions had been taken in good faith.

After a bench trial, the district judge entered a Memorandum Opinion and Order, p. 1a, infra, which held, in

pertinent part, that section 110.061, Florida Statutes (1977), was unconstitutional because it did not provide pre-termination procedures, a prompt post-termination hearing and back pay to a prevailing employee. The district judge further found that the Appellees were not entitled to a claim of good faith immunity because the law on pre-termination due process was settled at the time of their actions.

Subsequently, the Florida Legislature repealed section 110.061, Florida Statutes (1977). The district court then entered an Order Amending Judgment, p. 62a, infra. This Order vacated the portion of the previous order declaring section 110.061, Florida Statutes (1977), and its rules and regulations unconstitutional, and replaced it with a holding that the 1981 revision of

Chapter 110, Florida Statutes, and its implementing rules, were unconstitutional insofar as they failed to provide a prompt post-termination hearing. The Order Amending Judgment also recognized that the law as to pre-termination due process was not clearly established at the time in question and vacated that portion of the prior order. However, the district court held that since Appellants had violated certain regulations of their own agency, this deprived them of qualified immunity.

Appellants appealed the district court's ruling, both on the constitutionality of Chapter 110, Florida Statutes (1981), and its implementing rules, and the issue of good faith immunity, to the Court of Appeals for the Eleventh Circuit. The Court of Appeals issued a Rule 25

affirmance, without explanation, based on the order of the district judge. Appellants filed a Petition for Panel Rehearing which was denied.

THE QUESTIONS ARE SUBSTANTIAL

The two issues raised in this appeal are questions of the utmost importance to the State of Florida. They involve the procedure which the State must utilize in terminating employees from state employment and the standard by which Florida officials' future conduct will be judged. Both these issues were erroneously decided in light of clearly established federal constitutional precedent to the contrary and deserve this Court's attention.

1. Constitutionality of Chapter 110, Florida Statutes (1981).

The district court declared Chapter 110, Florida Statutes (1981), unconstitutional in regard to post-termination procedures. However, it is clear that such a question should never have been reached because the court had no justiciable issue before it.

Federal constitutional law is clear that for declaratory relief to be appropriate, a live dispute must be present. Golden v. Zwickler, 394 U.S. 103 (1969). In the case of a statute's constitutionality, the statute in question must have been in effect at the time in controversy and must have been applied to the complaining party. In the instant case, the statute which the district court found unconstitutional, Chapter 110, Florida Statutes (1981), had not even been promulgated, let alone applied, at the time of Appellee's termination in 1977. Thus, no live dispute as to the statute's constitutionality existed, and this issue was not justiciable.

Further, and closely related to the requirement of a live controversy, is the necessity that a litigant have a

personal stake in the resolution of an issue in order to invoke the power of a federal court to issue a declaratory judgment. O'Shea v. Littleton, 414 U.S. 488 (1974). If a litigant lacks this requisite personal interest, the issue becomes moot and is not appropriate for declaratory relief. Murphy v. Hunt, 455 U.S. 478 (1982), quoting, United States Parole Commission v. Geraghty, 445 U.S. 388 (1980). "[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them. North Carolina v. Rice, 404 U.S. 244, 246 (1971) (citation omitted). See also, Murphy v. Hunt; Mazaleski v. Harris, 481 F.Supp. 696 (S.D. D.C. 1979).

Appellee voluntarily left state employment in January 1979. Since that time he could not possibly have been

subject to the termination provisions of the Florida Career Service Commission as set forth in Chapter 110. Appellee's rights could in no way be affected by a declaration as to Chapter 110's constitutionality, and he therefore lacked the necessary personal stake in the outcome of the litigation needed to invoke the jurisdiction of the federal court. Thus, the district court should never have ruled on the statute's constitutionality.

A further, and equally well-established, principle of federal constitutional law is that when faced with a constitutional challenge to a statute, a court must interpret a statute so as to render it constitutional, if at all possible. Balsecki v. City of Durham, North Carolina, 456 F.2d 87 (4th Cir. 1972), cert. den., 409 U.S.

912 (1973); In re Evans, 452 F.2d 1239 (D.C. Cir. 1971), cert. den., 408 U.S. 930 (1971). Every effort must be made to save the constitutionality of a statute where at all possible.

In the present case, it is absolutely clear that the statute in question is constitutional on its face and capable of constitutional interpretation. See, Davis v. Williams, 617 F.2d 1100 (5th Cir. 1980), cert. den., 449 U.S. 937 (1981). This is not a case where the statute contains an affirmatively unconstitutional provision.

While the statute does not on its face state a time within during which a post-termination hearing must be held, the district court should have interpreted the statute to provide a hearing within whatever time frame is

constitutionally mandated. See, Caswell v. Califano, 538 F.2d 9 (1st Cir. 1978); Jordan v. United Insurance Co. of America, 289 F.2d 778 (D.C. Col. 1961); Cornelius v. Minter, 395 F.Supp. 616 (D.C. Mass. 1974). The district court ignored these stellar principles of statutory interpretation by striking a statute fully capable of constitutional interpretation.

Further, the statute in effect at the time of Appellee's termination, §110.061, Florida Statutes (1977), was constitutionally applied to Appellee. While nine months did elapse between Appellee's appeal and the time such appeal was set for hearing, this was not such a long delay as to render the statute constitutionally infirm. See, Ciechon v. City of Chicago, 634 F.2d 1055 (7th Cir. 1980); Thomson v. Bass,

616 F.2d 1259 (5th Cir. 1980), cert. den., 449 U.S. 983 (1980); Alsbury v. United States Post Office, 530 F.2d 852 (9th Cir. 1976), cert. den., 429 U.S. 828 (1977); Blackford v. Maryland Automobile Insurance Fund, 532 F.Supp. 24 (D. Md. 1981).

Appellee's situation was certainly different from that of the plaintiff in Barry v. Barchi, 443 U.S. 55 (1979), the only case cited by the district court in support of its holding striking the statute. In Barry, a suspension of fifteen days was in question. Because of the brief duration of the suspension, no hearing could be held until the full penalty had run and plaintiff, a horse trainer, had lost his clients. That is to be contrasted with Appellee's situation. Upon prevailing at the Career Service Commission, Appellee would have

been entitled to back pay and reinstatement. Appellee could have been made whole as contrasted with the plaintiff in Barry.

Finally, the district court's ruling gave absolutely no guidance or direction to the State of Florida in regard to what would be a constitutionally acceptable time-frame for the holding of a post-termination hearing. Rather, the ruling left Florida's Career Service Commission in a state of confusion. At the least, state officials deserve to know what is constitutionally permissible when a state statute is stricken.

2. Good Faith Immunity.

In Harlow v. Fitzgerald, ___ U.S. ___, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), this Court explicitly interpreted and explained the application of the good faith immunity defense. Prior

to Harlow, the immunity defense had a subjective and an objective prong. However, in Harlow, this Court eliminated the subjective prong of the defense as unworkable due to the disruptive effect on government of judicial inquiry into subjective motivation.

This Court announced in Harlow that henceforth the test for determining the applicability of good faith immunity would be the objective test as set out in Wood v. Strickland, 420 U.S. 308 (1975):

> [T]he judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Harlow, ___

U.S. ___, 102 S.Ct. 2727, 73 L.Ed.2d at 410-411 (emphasis added).

The district court specifically found that at the time of the conduct in question here, there was no clearly established constitutional law that such conduct violated Appellee's rights. See, p. 67a, infra. Under Wood and Harlow, this should have ended any inquiry into the good faith immunity defense, and judgment on the damages claim should have been entered in Appellant's favor.

It was clearly inconsistent with Harlow for the district court to find that a violation of agency regulation as opposed to federal constitutional law, meant that Appellants did not meet the test for objective good faith immunity. In doing so, the district court relied on this Court's initial announcement of the good faith immunity test in Scheuer v. Rhodes,

416 U.S. 232 (1974), and found that the test for good faith immunity was a general test of "reasonableness." The district court further found that violating agency regulation could not be reasonable and thus the good faith immunity defense was inapplicable.

However, this reasoning is clearly contrary to this Court's latest pronouncment on the good faith immunity question in Harlow. This Court was explicit in Harlow, and cases subsequent to Scheuer, such as Butz v. Economou, 438 U.S. 478 (1978), Procunier v. Navarette, 434 U.S. 555 (1977), and Wood v. Strickland, 420 U.S. 308 (1975), in detailing the appropriate objective test for good faith immunity. That test states that objective good faith immunity is abrogated only if "the constitutional right allegedly infringed . . . was clearly established at

the time of their challenged conduct" and "they knew or should have known of that right" and "they knew or should have known that their conduct violated the constitutional norm." Procunier v. Navarette, 434 U.S. at 562.

The good faith immunity cases subsequent to Scheuer have stated the objective good faith immunity test solely in terms of whether the constitutional law was clearly established at the time of the conduct in question. See, Crowder v. Lash, 687 F.2d 996 (7th Cir. 1982); Clanton v. Orleans Parish School Board, 649 F.2d 1084 (5th Cir. 1981); Jihaad v. O'Brien, 645 F.2d 556 (6th Cir. 1981); Jackson v. State of Mississippi, 644 F.2d 1142 (5th Cir. 1981). To consider agency regulations or state law, is to contavene those decisions.

Further, to require state officials to have followed the letter of all state

statutes, rules and regulations before the good faith immunity defense is applicable does not foster "the public interest in deterrence of unlawful conduct." Harlow, ___ U.S. ___, 102 S.Ct. 2727, 73 L.Ed.2d at 411. It will simply cause state officials to operate with the fear that, even though a citizen has no clearly established constitutional right, if state statutes or regulations are not followed, and those statutes or regulations are later determined by federal court to have foreshadowed, perhaps several years hence, subsequently developed constitutional law, the officials will be liable for damages. This flies directly in the face of the Supreme Court's statement in Procunier that officials "cannot be expected to predict the future course of constitutional law." 434 U.S. at 562.

Moreover, to decide the good faith immunity defense by reference to state regulations or law punishes those state agencies which have adopted administrative procedures going beyond the requirements of federal constitutional law. If prophylactic procedures are adopted and later found to be constitutionally required, agency officials will be liable in damages for failure to follow their own procedures. The end result is that the agency which is trying harder to provide protective procedures is punished. Thus, a state agency now may well decide that it will not provide any procedures for the protection of employees, prisoners, students or the general public unless required by clearly established federal constitutional law. If no procedures are adopted, state officials cannot be held liable for damages even if, in the future, a federal court decides

those procedures are constitutionally mandated.

The district court's decision that qualified good faith immunity was not available to Appellants because they did not follow an agency regulation contravenes Supreme Court cases establishing that "an official [will] not be held liable in damages under §1983 unless the constitutional right he was alleged to have violated was 'clearly established' at the time of the violation." Butz v. Economou, 438 U.S. at 498. Even if the law were not so clear, there are compelling policy reasons why reference to agency regulations or state law in deciding the good faith immunity issue is unnecessary and unwarranted.

Thus, the district court has inappropriately applied the test for good faith immunity. To allow its decision to stand

will recreate the confusion which this Court sought to allay in Harlow.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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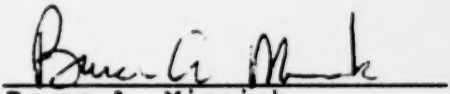
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Statement has been furnished by United States Mail to BEN R. PATTERSON, Counsel for Appellee, 1215 Thomasville Road, Post Office Box 4289, Tallahassee, Florida 32303, this 21st day of September, 1983.



Bruce A. Minnick

APPENDIX

TABLE OF CONTENTS

	PAGE
MEMORANDUM OPINION AND ORDER	1a
JUDGMENT ON DECISION BY THE COURT	56a
ORDER AMENDING JUDGMENT	62a
AMENDED JUDGMENT	79a
RULE 25 AFFIRMANCE OF THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT	83a
ON PETITION FOR REHEARING	85a
NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES	87a

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

GREGORY SCOTT SCHERER,

Plaintiff,

v. TCA 79-0885

RALPH DAVIS, individually;
CHESTER BLAKEMORE, officially
as Director of the Department
of Highway Safety and Motor
Vehicles; and J. ELDREDGE BEACH,
individually and as Director of
the Florida Highway Patrol, De-
partment of Highway Safety and
Motor Vehicles,

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiff Gregory Scott Scherer brought this complaint pursuant to the Fifth, Ninth, and Fourteenth Amendments to the United States Constitution and 42 USC §1983. Declaratory and injunctive relief are sought pursuant to 28 USC §§1651, 2201, and 2202. The court has jurisdiction under

28 USC §§1343 and 1331. Scherer seeks monetery damages, as well as injunctive and declaratory relief, for the defendants' failure to provide him with either pre-termination or post-termination due process; he also seeks a declaration that Section 110.061, Florida Statutes and its implementing rules and regulations are unconstitutional because violative of due process in their failure to safeguard an employee's rights prior to termination, to guarantee back pay or reinstatement for wrongful termination, and failure to provide expeditious post-termination hearing and decision.

On April 6, 1981, this case was tried before the court without a jury. Fed.R.Civ.P. 39(b). In accordance with Federal Rule of Civil Procedure 52(a), the court makes the following findings of fact relevant to the disposition of this case.

Findings of Fact

Gregory Scott Scherer was an employee of the State of Florida Department of Highway Safety and Motor Vehicles, Division of Florida Highway Patrol, Troop A, employed as of January 13, 1975, holding the position of a Radio-teletype Operator in Pensacola, Florida. Plaintiff Scherer had attained permanent status within the Career Service System of the State of Florida and had been consistently rated a satisfactory employee. His gross pay as of October 25, 1977, on a monthly basis, was seven hundred fifty-three dollars and thirty-three cents ($753.33).

During the months of September and October of 1977, the Executive Director of the Department of Highway Safety and Motor Vehicles was Ralph Davis. Davis continued as Executive Director of the agency until September 30, 1978, when he was succeeded

by Chester Blakemore. The Director of the Florida Highway Patrol (FHP) in 1977 and continuing to the present was and is Colonel Eldredge Beach. The policy of the Department of Highway Safety and Motor Vehicles required Beach and Davis to approve each and every suspension or dismissal of an employee of the FHP, including the dismissal of Scherer. Beach and Davis approved the plaintiff's dismissal from his employment effective October 25, 1977.

On September 9, 1975, the Department of Highway Safety and Motor Vehicles had adopted a policy on the subject of dual employment and compensation, Policy Number 009. The policy was signed by Ralph Davis. The purpose of the policy was to require approval of outside employment in order to avoid a conflict of interest. Pursuant to the requirements of that

policy, on August 26, 1977 Scherer requested that his troop commander, Captain K. S. Sconiers, approve Scherer's outside employment as an Escambia County Sheriff's Reserve Deputy. Sconiers told the plaintiff he doubted that approval would be granted, but by memorandum dated September 1, 1977, Captain Sconiers notified the plaintiff that he had permission to accept parttime employment as an Escambia County Sheriff's Reserve Deputy. The memorandum further stated that such permission would be rescinded "[S]hould this employment interfere in any way with your duties with this department." Sconiers claims his secretary was supposed to hold the September 1 letter until he had "checked with Tallahassee."

Relying on the letter of approval, Scherer purchased a uniform and a pistol and was employed parttime as an Escambia

County Sheriff's Reserve Deputy assigned with other such officers to guard the set for the movie "Jaws II." By memorandum dated September 23, 1977, Capt. Sconiers informed the plaintiff that ". . . the department feels that it would be of the best interest to our department for you not to accept this employment; therefore, your request . . . is denied at this time."

On October 3, 1977, Sgt. W. A. Clark informed Lt. C. C. Wiggins that plaintiff was continuing to work as a reserve deputy and recommended Scherer's termination from the FHP. On October 4, 1977, Lt. Wiggins informed Capt. Sconiers of plaintiff's continuance to work as a reserve deputy and recommended Scherer's suspension or dismissal. On October 7, 1977, Sgt. Clark informed Capt. Sconiers that he had advised Scherer he was violating instructions and Scherer had responded that he had invested

too much money in uniforms to give up his parttime work.

Sconiers then wrote to Col. J. E. Beach on October 12, 1977, attaching plaintiff's letter of request, the captain's own letters approving the request and rescinding the approval, Sgt. Clark's and Lt. Wiggins's memos, and recommending that plaintiff Scherer be suspended for three days for violation of the department's dual employment policy. On October 18, 1977, Lt. Wiggins ordered Scherer to terminate his employment as a reserve deputy and on the same date Scherer wrote to Capt. Sconiers explaining that he felt there was no reason for him to resign his outside employment because it did not interfere with his work as a radio operator for the FHP. Wiggins also wrote to Sconiers on that date saying Wiggins and Clark had spoken with Scherer and Scherer was unable

to see any interference in his FHP duties which was caused by his reserve deputy duties. Sconiers testified at trial that Major A. P. Floyd, Deputy Inspector of the FHP, had caused him to not approve Scherer's outside employment because Floyd thought that the possibility of Scherer being supoenaed in connection with his reserve deputy duties might conflict with his duties as a radio operator at the FHP.[1] No one ever identified the conflict to plaintiff; Wiggins testified he didn't know what the conflict was. Wiggins and Clark evidently asked the plaintiff only what his intentions were concerning his outside employment. On October 18, 1977, Sconiers forwarded to Beach the two letters of that date from Wiggins and Scherer's letter of that date, but mistakenly dated August 18, 1977.

By certified letter dated October 24, 1977 and received by plaintiff on October 25, 1977, Scherer was terminated from his FHP employment effective October 20, 1977. At no time prior to the letter of termination was the plaintiff given notice in writing of a proposed discharge or an opportunity to respond verbally or in writing to the official charged with making the termination decision, the defendant Beach. At no time prior to October 25, 1977, was the plaintiff notified of any right that he might have to respond to Col. Beach's letter of dismissal. There is no evidence of any affidavit or statement given or made to Beach or Davis which showed or purported to show that the plaintiff's outside employment conflicted in any manner with his duties as a radio-teletype operator for the Florida Department of Highway Safety and Motor Vehicles,

Division of Florida Highway Patrol, although the conflict has purportedly been identified by Beach's staff. In addition, the choice to dismiss rather than suspend Scherer, is in violation of the department's own disciplinary guidelines.

On November 10, 1977, the plaintiff, pursuant to the Florida statutory scheme providing for a hearing on dismissal for Career Service Employees, filed an appeal against his dismissal with the Florida Career Service Commission, claiming he had been dismissed without just cause because his dismissal was pursuant to a rule not validly adopted by the department. On November 18, 1977, the plaintiff was notified by Dorothy B. Roberts, Appeals Coordinator, that his appeal had been received and that the Department of Highway Safety and Motor Vehicles had been requested to provide certain information

relative to his employment status to enable the Career Service Commission to determine the plaintiff's appeal rights. By letter dated December 8, 1977, signed by Miles R. Dean, from Conley M. Kennison, State Personnel Director, Mr. Scherer was notified that his appeal was in order and would be heard by the Career Service Commission. Scherer's attorneys did not request an expedited hearing.

On or about April 19, 1978, and pursuant to the Administrative Procedures Act, the plaintiff filed a petition for a rule challenge to Policy Number 009 of the Department. On June 28, 1978, the challenged Policy Number 009 on the subject of dual employment and compensation was declared invalid. The Department of Highway Safety and Motor Vehicles did not appeal the invalidation of Policy Number 009 to the District Court of Appeal, and

the determination that the Policy Number 009 as applied to plaintiff was an invalid rule became final on July 28, 1978.

By letter dated July 13, 1978, signed by Dorothy B. Roberts, Appeals Coordinator for the Career Service Commission, the plaintiff was notified that his appeal against dismissal would be heard by the Career Service Commission on August 4, 1978. On July 24, 1978, the Department of Highway Safety and Motor Vehicles gave notice to the plaintiff of additional reasons for the plaintiff's dismissal of October 25, 1977.

Section 110.061, Florida Statutes provides that the Career Service Commisson may, "in its discretion," order reinstatement for termination of a career service employee "without just cause" without awarding back pay. The Career Service Commission is given ninety days from the

date of hearing an appeal within which to issue its written order, either upholding an agency's action or reinstating an employee determined to have been unjustly discharged. §120.59, F.S. If a state agency appeals an adverse decision of the commission, the commission's order to reinstate is stayed, by operation of the Florida Rules of Appellate Procedure, until after the District Court of Appeal has disposed of the agency's appeal. See §120.68, F.S.; Rule 9.310(b)(2), Fla.R.App.P.

On August 10, 1978, the Career Service Commission entered its order approving a stipulation and agreement between the Department of Highway Safety and Motor Vehicles and the plaintiff, by which plaintiff's dismissal was withdrawn and plaintiff was credited with his sick and annual leave as if no dismissal had

occurred, was awarded three thousand four hundred fifty dollars (3,450.00) for back wages, and was reinstated to his position of employment effective August 4, 1978. Had Scherer continued as a Radio-teletype Operator with the Department of Highway Safety and Motor Vehicles from October 25, 1977 to August 4, 1978, he would have earned six thousand eight hundred sixteen dollars and fifty-one cents ($6,816.51) from such employment.

Following his dismissal on October 25, 1977, the plaintiff worked odd jobs as an auxiliary deputy. He couldn't meet his bills and was forced to borrow money from his parents and in-laws. He owed money to loan companies and banks and had certain personal property repossessed. Scherer's physical and mental health deteriorated. He lost weight; smoked and drank heavily; slept restlessly, if at all; avoided his

friends; and was humiliated and embarrased [sic] by his financial situation and his dealings with creditors. The plaintiff's worst mental depression was in the first six months following the discharge, but he is still troubled by the problems it initiated. Scherer and his wife filed a petition in bankruptcy on December 6, 1979, of which this court takes judicial notice, and were adjudged bankrupt in 1980. They have been unable to get credit since that adjudication and both testified as to their inability to purchase a home.

Plaintiff Scherer reported back to work to the Chief of Radio-teletype Operations, W. A. Hagerty, in Pensacola on August 4, 1978, the same day as his Career Service hearing in Tallahassee. On August 7, 1978, Chief Hagerty called plaintiff from his work area and accompanied him to Sgt. Clark's office. Clark inquired as to

Scherer's intentions with the FHP and Scherer informed him that he was planning to apply for a trooper's position. Clark adivsed Scherer that he would not recommend the plaintiff for a trooper's position because in his opinion Scherer would not make a good trooper, having failed to obey an order and having won his appeal only because of a "technicality."

On August 18, 1978, plaintiff requested that Chief Hagerty allow him to take a week of annual leave. At the time of the request, Chief Hagerty said he would approve plaintiff's leave, but when plaintiff checked twelve days later to see if his request had been given official approval, Hagerty said he would have to check with Sgt. Clark. Later that day, Hagerty informed Scherer that Sgt. Clark and Lt. Wiggins had no written proof that Scherer had annual leave accumulated.

Plaintiff requested they call the departmental personnel office in Tallahassee to verify his leave and Hagerty said verification would have to be written. Plaintiff himself phoned personnel, requesting that the director contact Capt. Sconiers regarding his accumulated leave. A short while later he got a call from Hagerty advising his leave had been approved.

On September 1, 1978, Chief Hagerty informed plaintiff that his shift had been changed so that another operator could be given Saturdays and Sundays off. This resulted in Scherer having to rotate to the 11:00 p.m. to 7:00 a.m. shift more frequently than he would ordinarily. The midnight shift was considered onerous duty.

On September 11, 1978, plaintiff became ill while on duty and notified his corporal who came about an hour later and took

Scherer to the hospital. Two days later, while Scherer was recovering from the bout with kidney stones, Chief Hagerty came to the hospital with a State of Florida employment application for Scherer to fill out. Scherer refused to do so from memory and responded that it would have to wait until he could obtain a copy of his original application, which was on file in Tallahassee, to make sure that the second application was completed accurately. Plaintiff reported these incidents of August 7, August 30, September 1 and September 13 to Capt. Sconiers by letters, copies of which were also sent to Lt. Wiggins and Col. Beach, requesting that Clark and Hagerty be disciplined for harassment. Plaintiff testified that there were additional incidents continuing up to January 11, 1979, but that he got tired of writing letters to no avail.

Capt. Sconiers explained the incidents of leave time and the application as caused by the necessity to update Troop A's records following Scherer's reinstatement. As soon as plaintiff's leave was verified, his request was granted; the employment application was thought to be necessary to get Scherer back on the payroll. However, Clerk [sic] and Hagerty were apparently less than cooperative to Scherer in getting these "housekeeping" measures accomplished.

There is no evidence of any immediate response on the part of Col. Beach to plaintiff's letters charging harassment. Capt. Sconiers, however, advised Sgt. Clark that he had been wrong to talk to Scherer as he had about Scherer's aspirations to be a tropper and Lt. Wiggins told Sgt. Clark much the same thing. Lt. Wiggins also advised Chief Hagerty that he shouldn't

change one operator's shift to accomodate another; that both should agree to any change. Lt. Wiggins advised both Hagerty and Clerk [sic] to forget the past and leave the plaintiff alone, but Clark admitted he was of the "old school" and thought one should follow instructions without question. Wiggins and C. P. Anthony, the chief dispatcher, both testified that Hagerty and the plaintiff had a personality conflict. Although there is no evidence that an order to "hard time" plaintiff came down the chain of command, Clark and Hagerty apparently did exactly that.

In January of 1979, plaintiff and Chief Dispatcher Anthony were working on the 3:00 p.m. to 11:00 p.m. shift when they began to have low band problems. Both men were aware that FCC regulations require that only a qualified engineer repair the radio

equipment. Anthony testified that Scherer went to the transmitter room with a fuse and soon the transmitter was working again, although the radio was still not functioning on the receiving side. Sconiers thought either Anthony or Clark advised him that Scherer replaced the fuse and Sconiers sent the information to Tallahassee. Scherer insists the licensed engineer told him to replace the fuse to save the engineer from having to make a trip to Pensacola from Panama City to do so.

Major John Hicks, a deputy inspector in 1979, was sent to Pensacola on January 10 to investigate the trouble with the radio equipment. Hicks sent word to Wiggins and Sconiers that he wanted to meet with the plaintiff. Scherer was told near the end of his shift at 7:00 a.m., to stay for two hours to meet with Major Pitts [sic]. The plaintiff left at the end of his shift to

take his pregnant wife to her doctor's appointment. Scherer left word that "the Major could shove it." When Major Hicks got to Pensacola and was advised the plaintiff was not waiting to meet with him, he reported this to Col. Beach and a teletype was sent suspending the plaintiff pending "completion of investigation."

By memorandum dated January 11, 1979, the plaintiff informed defendant Beach that he wished to resign his position with the Highway Patrol effective January 13, 1979. By memorandum dated January 12, 1979, defendant Beach advised plaintiff Scherer that Scherer was relieved of duty January 10, 1979, pending an investigation; however, in view of plaintiff's letter of January 11, 1979, his resignation was accepted effective January 13, 1979. The plaintiff's last day on the payroll of the Department of Highway Safety and Motor

Vehicles was January 13, 1979. As of the date Scherer was making seven hundred seventy-two dollars ($772) monthly. The plaintiff received all his accrued leave and did not attempt to take an appeal from the second termination of his FHP emplomentto the Career Service Commission. Scherer asserts he resigned in order to avoid further harassment and to remove a cloud over his employability so that he would be able to accept employment which he had already been offered at the Escambia County Sheriff's Office.

Conclusions of Law

A. The effect of the Career Service Commission Settlement.

Initially, this court must consider the effect of the plaintiff's settlement of his Career Service Commission proceeding against the Department of Highway Safety

and Motor Vehicles for the official acts of its agents who are individually sued herein. The defendants contend that by entering the settlement with the department, which was subsequently approved by the commission, and by accepting partial back pay and reinstatement, as well as partial payment of his attorneys' fees, the plaintiff waived his right to relief under 42 USC §1983. For such contention, defendants rely on Strozier v. General Motors Corp., 442 F.Supp. 475 at 481 (N.D. Ga. 1977) which in turn relies on the pronouncement of the Fifth Circuit United States Court of Appeals against employee windfalls in United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975), cert. denied, 425 U.S. 944, 48 L.Ed.2d 187 (1976). In view of Scherer's admitted knowing and voluntary settlement of his CSC action, the apparent general

philosophy of this circuit expressed en banc in Patsy v. Florida International University, 634 F.2d 900 (5th Cir. 1981), and the above-cited interpretaiton of Footnote 15 of Alexander v. Gardner-Denver Company, 415 U.S. 36, 39 L.Ed.2d 147 at 160 (1974), defendants' argument for waiver of plaintiff's statutory rights in this instance is initially persuasive.

In the absence of a settlement containing express waiver of Scherer's §1983 claims, however, this court finds its decision on this issue to be controlled by the Fifth Circuit's latest and most specific treatment of the settlement issue in Strozier v. General Motors Corp., 635 F.2d 424 at 426-7 (5th Cir. 1981). In affirming the district court's finding of waiver in Strozier, the Fifth Circuit reiterated its earlier pronouncement:

> In no respect does . . . Gardner-Denver support the assertion that an

> aggrieved employee who freely settles his or her unliquidated demand with the employer or the union may reciprocate by suing the same defendant at a later date on the same cause of action, merely because the employee grows dissatisfied with the payment for which he or she settled.

United States v. Allegheny-Ludlum Industries, Inc., supra at 858.

The court then proceeded to base its affirmance on the fact that Strozier had accepted settlement of a grievance action in which the remedy sought and settled was the precise remedy sought in the later lawsuit, which was held to be barred with respect to such claims. Strozier v. Gen. Motors Corp., supra at 426-7. Unlike Strozier, plaintiff Scherer has specifically pled for additional specialized relief in this action which could not have been afforded in the Career Service Commission proceeding, i.e. declaratory relief, additional compensatory damages, and exemplary damages.

The Fifth Circuit's Strozier opinion thus controls this court's holding that the claim plaintiff Scherer has herein asserted for unrecovered wages lost by his termination of October 20, 1977 and subsequent unemployment until August 4, 1978 and any claim for injunctive relief for any violations of due process attendant to that termination have been fatally compromised by his acceptance of partial back pay and reinstatement in the CSC settlement.[2] Plaintiff's claims for compensatory damages not recoverable in a Career Service Commission proceeding, his claims for exemplary damages, and his claim for declaratory relief have not been waived.

B. Section 110.061, Florida Statutes, and Due Process.

As a permanent career service employee of the State of Florida, Scherer had a recognized property interest in his employment. §110.061, F.S.; Op. Att. Gen. 075-94; Prince v. Lewis, TCA 75-149 (N.D. Fla. December 28, 1978); Board of Regents v. Roth, 408 U.S. 593 (1972). His dismissal from such employment was a deprivation of that property interest. Scherer's dismissal by defendants Davis and Beach constituted state action for which legitimate governmental concern was asserted. Thus, the four essential elements which must be met for the Due Process Clause of the Fourteenth Amendment to apply are present in this case. See Craig v. Carson, 449 F.Supp. 385, 390 (M.D. Fla. 1978).

Because the scope of those rights redressable under 42 USC §1983 is identical to the "centerpiece" of constitutional rights guaranteed by the Fourteenth Amendment, the necessary elements for a §1983 claim, (1) conduct by a defendant under the authority of state law and (2) deprivation of a plaintiff's constitutional rights by that conduct, have also been established herein if Scherer's due process rights were violated. Mitchum v. Foster, 407 U.S. 225, 238-9 (1972); Monroe v. Pape, 365 U.S. 167, 171 (1961); Morgan v. Odom, 552 F.2d 147, 148 (5th Cir. 1977); Sullivan v. Brown, 544 F.2d 279, 284 (6th Cir. 1976).

In determining whether the procedures afforded plaintiff comported with the dictates of the Fourteenth Amendment, this court recognizes that the United States Supreme Court has consistently held that an

individual is entitled to some sort of procedural protection before being deprived of a property interest. Mathews v. Eldridge, 424 U.S 319 (1976); Board of Regents v. Roth, supra. The concept of due process is a flexible one. Morrisey v. Brewer, 408 U.S. 471 (1972); Hannan v. Larche, 363 U.S. 420 (1960); Hicks v. Dobbs, 612 F.2d 577 (5th Cir. 1980).

The fundamental requirement of due process is "the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394 (1914). The purpose of this requirement is not only to ensure the abstract concept of fair play, but also to prevent the arbitrary deprivation of property rights. Fuentes v. Shevin, 407 U.S. 67 (1972). The opportunity to be heard should be granted at a meaningful time and in a manner which is appropriate to the nature of the situation. Armstrong v. Manzo, 380 U.S.

306 (1950). It "must be tailored to the capacities and circumstances of those who are to be heard." Goldberg v. Kelly, 397 U.S. 254, 268-9 (1970).

Determination of whether due process requires an evidentiary hearing prior to the deprivation of a property interest requires analysis of such factors as (1) the nature of the private interest affected; (2) the risk of an erroneous deprivation of a property interest; (3) the probable value of substitute or additional procedural safeguards; and (4) the governmental interest that substitute or additional procedures would affect. Mathews v. Eldridge, supra; Dixon v. Love, 431 U.S. 105 (1977).

The formula in Mathews calls for a balancing of the government's interest in the maintenance of an employee's efficiency and discipline against the plaintiff's

interest in keeping his public employment pending an evidentiary hearing. In Arnett v. Kennedy, 416 U.S. 134 (1974), a majority of the justices found that (1) a federal statute guaranteeing continued employment absent cause for discharge confers a legitimate claim of entitlement constituting a property right under the Fifth Amendment; (2) for an employee to be deprived of a protected property interest in continued employment, an evidentiary trial-type hearing is necessary at some stage of the proceeding; and (3) a pre-termination hearing is not required for non-probationary employees in the competitive civil service, since the Lloyd-LaFollette Act, 5 USC §7501, provides other procedureal safeguards in lieu of a pre-dismissal evidentiary hearing, which safeguards represent a reasonable accommodation of competing interests.

Section 110.061, Florida Statutes (1977) contains no requirement of a pretermination hearing and none was provided Scherer. Of course, Thurston v. Dekle, 531 F.2d 1264, 1272 (5th Cir. 1976), vacated on other grounds 438 U.S. 901 (1978), on remand 578 F.2d 1167 (1978) makes it clear that a full evidentiary hearing prior to employment termination is not required. The balance which is struck must minimize the risk of wrongful termination while not requiring elaborate pretermination proceedings which wuold burden the governmental function. See Board of Regents v. Roth, supra at 579 n.7. However, it is not constitutionally sufficient to grant a due process hearing following termination with nothing more. The law requires that

> Where a governmental employer chooses to postpone the opportunity of a non-probationary employee to

> secure a full-evidentiary hearing until after dismissal, risk reducing procedures must be accorded. These must include, prior to termination, written notice of the reason for termination and an effective opportunity to rebut those reasons. Effective rebuttal must give the employee the right to respond in writing to the charges made and to respond orally before the official charged with the responsibility of making the termination decision (footnotes omitted).

Thurston v. Dekle, 531 F.2d at 1273. When a state's interest justifies action after only summary informal proceedings, the full post-termination hearing "must be available promptly after the temporary deprivation occurs." (Emphasis in original; citations omitted.) Barry v. Barchi, 443 U.S. 55, 51 L.Ed.2d 365, 380 (1979).

Section 110.061, Florida Statutes (1977) and its contemporary implementing rules do not require written notice of the reasons for termination, nor is any provi-

sion made for the effective confrontation of the termination decision maker prior to termination. Indeed, the pretermination protections provided by the statute and rules fall far short of those found inadequate in Thurston. See Glenn v. Newman, 614 F.2d 467, 472 (1980). Further, the post-termination hearing process does not assure the requisite promptness.

With respect to Scherer's termination the procedures followed by defendants Beach and Davis were inadequate. The plaintiff did not have an effective opportunity to rebut the claim of conflict between his outside employment and his duties for the FHP or to dispute prior to the termination decision whether the pursuance of dual employment constituted cause for dismissal. Scherer was given written notice of dismissal along with notice of the stated reason. No effective

opportunity to present oral or written argument to Ralph Davis or Col. Beach, the ultimate decision maker, was ever provided. Plaintiff was not offered the prompt hearing and prompt disposition of his appeal from the termination decision which is mandated by Barry v. Barchi and prior cases. His attorneys' failure to move the commission for an expedited hearing, even had they known of the possibility of such scheduling relief, does not mitigate the fact that the statutorily-created appeal process is not sufficiently prompt to provide adeuquate due process.[3]

Section 110.061, Florida Statutes (1977) has been previously held to be constitutionally deficient because it provides that the commission may order reinstatement for wrongful termination without awarding back pay, a decision which would itself amount to a due process

violation. See Casines v. Murchek, et al., TCA 78-820, p. 8 (N.D. Fla. January 13, 1981).

Based on his October 24, 1977 termination, plaintiff is entitled to a declaration that Section 110.061, Florida Statutes (1977) and its implementing rules are unconstitutional insofar as (1) they fail to mandate pre-termination procedures which safeguard the rights of employees, (2) they fail to provide a prompt post-termination hearing and (3) they fail to guarantee back pay to an employee determined to have been dismissed without just cause.

Plaintiff's suspension on January 10, 1979, pending "completion of an investigation" into destruction of state property was accomplished by means of admittedly minimal written notice, i.e. Col. Beach's teletyped message. Considering all of the

circumstances, such suspension did not offend due process requirements, due process being a flexible concept. (See discussion, supra at 14-16). Scherer's refusal to cooperate with the investigation and his January 11, 1979 voluntary and knowing resignation from his FHP employment caused the department to abandon the investigation and any subsequent disciplinary action based upon it. This court holds that Scherer's resignation, which he submitted only after getting agreement that the department would "drop it all in Tallahassee," constituted a waiver of his rights of appeal to the Career Service Commission. Cf. State of Florida Dept. of Transportation v. State of Florida Career Service Commission, 366 So.2d 473 (Fla. 1st DCA 1979). A knowing and voluntary resignation waives any right to the procedural protections to which an

employee would otherwise be entitled. Van Arsdel v. Texas A & M University, 628 F.2d 344, 345 (5th Cir. 1980); Stewart v. Bailey, 556 F.2d 281, 285-86 (5th Cir. 1977). The motion of Defendants Blakemore and Beach for a directed verdict, ruling on which was deferred at trial, is granted with respect to Scherer's claims for back pay and injunctive relief based on his January 13, 1979 separation from his Career Service employment.

C. Infringement of Plaintiff's Liberty Interest.

The court finds no merit to plaintiff's contention that he had a liberty interest in his secondary employment which was infringed by the actions of defendants Beach and Davis by their denial, without hearing, of permission to work a second job. See Meachum v. Fano, 427 U.S. 215 at 224, 226-7; 49 L.Ed.2d 451 (1976); Montanye

v. Haynes, 427 U.S. 236 at 242-3, 49 L.Ed.2d 466 (1976).

Plaintiff has advanced another due process argument, claiming under 42 USC §1983 a denial of fundamental due process by stigmatization, that is, an injury to reputation, good name and integrity as the result of the termination of his employment. Not every defamation of an individual by the government is constitutionally protected as a liberty interest. Such a liberty interest can arise only in specific contexts and is dependent upon as special relationship between the individual and the government. The Supreme Court has held that in the public employee context, a liberty interest arises if an individual has been terminated in a manner "that might seriously damage his standing and association in the community" or foreclose

"his freedom to take advantage of other employment opportunities." Board of Regents v. Roth, supra, 408 U.S. at 573. See Dennis v. S&S Consolidated Rural H.S. Dist., 577 F.2d 338, 340 (5th Cir. 1978); Kaprelian v. Texas Woman's University, 509 F.2d 133, 137 (5th Cir. 1975).

One's concern for his reputation in the public employment context, without a tangible interest in that employment, is not sufficient to invoke the due process clause. Paul v. Davis, 424 U.S. 693 (1976). The Fifth Circuit terms that requirements "stigma plus", so that an individual must be "stigmatized in connection with a denial of a right or status previously recognized under state law." Dennis, supra, 577 F.2d at 341. As discussed supra, Scherer has shown a property interest sufficient to invoke procedural due process. Yet, in the governmental employee context,

> [i]t is the individual's status as a government employee and not his property interest in continued employment which furnished the "plus" that raises reputation to the level of a constitutionally protected liberty interest.

Dennis, supra, 577 F.2d at 343. Finally, plaintiff must have established that the stigmatizing fact was "substantially false." Codd v. Velger, 429 U.S. 624, 627 (1977); McElwee v. Todd, 581 F.d 1182 (5th Cir. 1978). Scherer has not presented evidence sufficient to establish his claims of stigmatization.

The court further finds no evidence that the incidents of harassment that plaintiff experienced following his re-instatement with the FHP were in any way orchestrated or directed by defendants Beach and Davis. In accordance with the holdings of Rizzo v. Goode, 423 U.S. 362 at 370-1, 46 L.Ed.2d 561 (1976); Duchesne v.

Sugarman, 566 F.2d 817 at 831 (2nd Cir. 1977); and Wanger v. Bonner, 621 F.2d 675 at 680-1 (5th Cir. 1980), this court grants the defendants' motion for a directed verdict, with respect to plaintiff's claims of infringement of a liberty interest and his claims of denial of his right of privacy. In all other respects, the motion for a directed verdict is denied. See 5 J. Moore, Federal Practice, ¶50; 2[1][(2d ed.).

D. Qualified Immunity

As public officials, defendants Davis and Beach enjoy a quaified immunity which limits their liability for damages. Scheuer v. Rhodes, 416 U.S. 232 (1974); Cruz v. Beto, 603 F.2d 1178 (5th Cir. 1979). That immunity can be lost if the constitutional rights allegedly infringed by the defendants were "clearly estab-

lished" at the time of the defendants' challenged conduct; if defendants knew or should have known of those rights and if they knew or should have known that their conduct violated the constitutional norm. Procunier v. Navarette, 434 U.S. 555, 562 (1978); Wood v. Strickland, 420 U.S. 308, 322 (1975); Cruz v. Beto, supra at 1183.

The Supreme Court's decisions in Board of Regents v. Roth, supra and Perry v. Sinderman, supra issued in 1972, with Arnett v. Kennedy following in 1974. The Attorney General of the State of Florida rendered an opinion in 1975 that the "terminated for cause" provision of Section 110.061, Florida Statutes, created a property interest in their jobs for permanent Career Service employees and that such property interest was protected by the Due Process Clause of the Fourteenth Amendment. As of 1975, all that was

arguably unsettled was exactly what procedures would protect that interest. This remaining question was answered with the decision in Thurston v. Dekle, 531 F.2d 1264 (5th Cir. 1976) on May 20, 1976. The petition for writ of certiorari in Thurston v. Dekle was not granted until June 26, 1978 and only that portion of the case affected by the Supreme Court's decision in Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658 (1978) was vacated. Thurston v. Dekle, 438 U.S. 901, 57 L.Ed.2d 1144 (1978), on remand 578 F.2d 1167 (5th Cir. 1978). See also Bundy v. Rudd, 581 F.2d 1126 at 1131, n.2 (5th Cir. 1978); Glenn v. Newman, 614 F.2d 467 at 472 (5th Cir. 1980). In the face of the above-cited decisions, the law with regard to pretermination procedures was clearly established prior to this court's ruling in Prince v. Lewis, TCA 75-149 (N.D. Fla. December 8, 1978).

Plaintiff Scherer's due process rights were clearly established at the time of his October 24, 1977 dismissal from the FHP and defendants Beach and Davis, as officials charged with the responsibility of making dismissal decisions for the Department of Highway Safety and Motor Vehicles reasonably should have known that their failure to provide any pre-termination procedure violated plaintiff's constitutional rights. Thus, although this court finds no evidence of malicious intention on the part of defendants Beach and Davis, it holds that their actions cannot reasonably be characterized as being in good faith. See Wood v. Strickland, 420 U.S. 308 at 322, 43 L.Ed.2d 214 (1975); Bogard v. Cook, 586 F.2d 399 at 411-12 (5th Cir. 1978). Defendants Beach and Davis are thus held to be liable for the compensatory damages which plaintiff has proven on claims not

compromised by his settlement with the department. Further, because this court has found that the dismissal decision of Beach and Davis violated the department's own disciplinary guidelines, the court finds exemplary damages to be appropriate.[4]

E. Damages

As earlier held, plaintiff may not recover additional lost wages from the period of unemployment following the October 20, 1977 discharge until his reinstatement on August 4, 1978, having settled that claim in his Career Service Commission hearing. Neither may he recover herein for the unrecompensed attorney's fees incurred in that proceeding, because the commission's award of a reasonable attorney's fee was a part of his settlement in the prior proceeding.

As damages for his physical and mental pain and suffering following the October

1977 discharge, the court hereby awards one hundred dollars ($100.00) a week for his forty-two (42) weeks of unemployment, or a total of four thousand two hundred dollars ($4200.00).

Although plaintiff seeks damages from his adjudication of bankruptcy, the court is unable to view the bankruptcy as directly and causally connected to plaintiff's 1977 termination, the petition having been filed at the end of 1979, after plaintiff had been reinstated and employed with only the interruption of a matter of days between his second job separation from the highway patrol and his employment with the Escambia County Sheriff's Office. In the absence of plaintiff's proof of causal connection between the 1977-78 unemployment and the 1980 bankruptcy, this court denies plaintiff's request for damages measured by the affects of his having been adjudged bankrupt.

The court awards exemplary damages against Col. J. E. Beach and Ralph Davis at the rate of two thousand five hundred dollars ($2500.00) each, for a total exemplary damage award of five thousand dollars ($5000.00) to plaintiff.

ORDER

In accordance with all of the foregoing, it is ORDERED AND ADJUDGED:

1. Plaintiff's claims herein for declaratory relief, compensatory relief other than lost wages, and punitive damages based on his October 20, 1977 termination from Career Service employment with the State of Florida are not barred by virtue of voluntary and knowing settlement of his Career Service Commission proceeding against the Department of Highway Safety and Motor Vehicles.

2. Section 110.061, Florida Statutes (1977) and its implementing rules are unconstitutional insofar as (1) they fail to mandate pre-termination procedures which safeguard the rights of employees, (2) they fail to provide a prompt post-termination hearing, and (3) they fail to guarantee back pay to an employee determined to have been dismissed without just cause.

3. Defendants' motion for directed verdict is granted with respect to plaintiff's claims in Count I of infringement of a constitutionally recognized liberty interest and with respect to all plaintiff's claims in Count II.

4. Defendants Ralph Davis and Col. J. E. Beach are not entitled to the qualifying good faith immunity defense from liability for plaintiff's damages from his October

1977 termination from employment, the law with regard to pre-termination procedural due process having been settled by the time of their actions.

5. Plaintiff is entitled to four thousand two hundred dollars ($4200.00) in compensatory damages for his mental and physical pain and suffering.

6. Exemplary damages are awarded to plaintiff because of the failure of Ralph Davis and Col. J. E. Beach to follow the disciplinary guidelines of the Department of Highway Safety and Motor Vehicles in making their decision of October 24, 1977 to terminate G. S. Scherer from his employment with the Florida Highway Patrol.

7. Plaintiff is entitled to twenty five hundred dollars ($2500.00) in exemplary damages from Col. J. E. Beach and twenty five hundred dollars ($2500.00) in exemplary damages from Ralph Davis.

8. Plaintiff's suspension of January 10, 1977 from Career Service employment, pending investigation of a charge of destruction of state property, did not offend the requirements of the Due Process Clause of the Fourteenth Amendment.

9. Plaintiff's voluntary and knowing resignation of his Career Service employment, based on agreement of the Department of Highway Safety and Motor Vehicles to abandon its investigation of charges against him of destruction of State property, constituted a waiver of his right of appeal pursuant to Section 110.061, Florida Statutes (1978 Supp.).

10. Plaintiff is entitled to his attorneys' fees and costs for litigation of the claims herein which were not barred by the prior settlement of his Career Service Commission proceeding. Plaintiff has 10 working days from the date of his order to

submit affidavits on attorneys' fees and costs to defendants. Defendants have 10 working days in which to respond. Following such response, the parties have 10 working days in which to negotiate a settlement of the amount to be awarded. If settlement cannot be made, the court will entertain a motion for said award.

11. The Clerk of this Court will enter judgment accordingly.

DONE AND ORDERED this 15th day of July, 1981.

/s/
WILLIAM STAFFORD
CHIEF JUDGE

FOOTNOTES FOLLOW

FOOTNOTES: Gregory Scott Scherer v. Ralph Davis, et al., TCA 79-0885

1. Troopers E. D. Sapp and S. R. Bevis of Troop A (Sconiers' troop) also requested authorization to work secondary employment as security personnel on the Universal Studio's set in Santa Rosa County. They received approval which was never revoked.

2. Although back pay is not guaranteed a Career Service Employee found by the commission to have been unjustly discharged, §110.061, F.S., Scherer's acceptance of partial backpay in settlement must be held to bar any further backpay award he might be able to prove herein in accordance with the Fifth Circuit's Strozier and U.S. v. Allegheny-Ludlum decisions.

3. Granting a motion for expedited hearing is apparently within the discretion of the commission. Thus, failure to request expedited hearing cannot be held to constitute acquiescence in the delay in the appeal process created by Florida Statute. The notion that one must request expedited hearing in hopes of obtaining minimal due process only points out the absence of minimal due process in the standard statutorily-created process.

4. These damages should not be considered PUNITIVE damages, which would have been awarded if the defendants' actions demonstrated malicious intention. They are, rather, EXEMPLARY damages, awarded solely on the basis of defendants' failure to follow the department's disciplinary guidelines. Although Beach and Davis

evidently consulted both the department's personnel director and the department's legal counsel before making the final dismissal decision, Beach and Davis are the officials charged with responsibility for the official action of dismissal.

JUDGMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT

for the

NORTHERN DISTRICT OF FLORIDA

CIVIL ACTION FILE
NO. TCA 79-0885

JUDGMENT

GREGORY SCOTT SCHERER,

vs.

RALPH DAVIS, individually; CHESTER BLAKEMORE, officially as Director of the Department of Highway Safety and Motor Vehicles; and J. ELDREDGE BEACH, individually and as Director of the Florida Highway Patrol, Department of Highway Safety and Motor Vehicles,

This action came on for trial before the Court, Honorable William Stafford, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged

1. Plaintiff's claims herein for declaratory relief, compensatory relief other than lost wages, and punitive damages based on his October 20, 1977, termination from Career Service employment with the State of Florida are not barred by virtue of voluntary and knowing settlement of his Career Service Commission proceeding against the Department of Highway Safety and Motor Vehicles.

2. Section 110.061, Florida Statutes (1977) and its implementing rules are unconstitutional insofar as (1) they fail to mandate pre-termination procedures which safeguard the rights of employees, (2) they fail to provide a prompt post-termination hearing, and (3) they fail to guarantee back pay to an employee determined to have been dismissed without just cause.

3. Defendants' motion for directed verdict is granted with respect to

plaintiff's claims in Count I of infringement of a constitutionally recognized liberty interest and with respect to all of plaintiff's claims in Count II.

4. Defendants Ralph Davis and Col. J. E. Beach are not entitled to the qualifying good faith immunity defense from liability for plaintiff's damages from his October 1977 termination from employment, the law with regard to pre-termination procedural due process having been settled by the time of their actions.

5. Plaintiff, Gregory Scott Scherer, shall recover from defendants, Ralph Davis and J. Eldredge Beach, the sum of $4,200.00 in compensatory damages for his mental and physical pain and suffering.

6. Exemplary damages are awarded to plaintiff because of the failure of Ralph Davis and Col. J. E. Beach to follow the disciplinary guidelines of the Department

of Highway Safety and Motor Vehicles in making their decision of October 24, 1977, to terminate G. S. Scherer from his employment with the Florida Highway Patrol.

7. Plaintiff, Gregory Scott Scherer, shall recover from defendant Col. J. E. Beach the sum of $2,500.00 in exemplary damages and from defendant Ralph Davis the sum of $2,500.00 in exemplary damages.

8. Plaintiff's suspension of January 10, 1977, from Career Service employment, pending investigation of a charge of destruction of state property, did not offend the requirements of the Due Process Clause of the Fourteenth Amendment.

9. Plaintiff's voluntary and knowing resignation of his Career Service employment, based on agreement of the Department of Highway Safety and Motor Vehicles to abandon its investigation of charges against him of destruction of State

property, constituted a waiver of his right of appeal pursuant to Section 110.061, Florida Statutes (1978 Supp.).

10. Plaintiff is entitled to his attorneys' fees and costs for litigation of the claims herein which were not barred by the prior settlement of his Career Service Commission proceeding. Plaintiff has 10 working days from the date of this order to submit affidavits on attorneys' fees and costs to defendants. Defendants have 10 working days in which to respond. Following such response, the parties have 10 working days in which to negotiate a settlement of the amount to be awarded. If settlement cannot be made, the court will entertain a motion for said award.

Dated at Tallahassee, Florida, this 17th day of July, 1981.

MARVIN S. WAITS, Clerk

By /s/
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

GREGORY SCOTT SCHERER,

Plaintiff,

v. TCA 79-0885

RALPH DAVIS, individually; CHESTER BLAKEMORE, officially as Director of the Department of Highway Safety and Motor Vehicles; and J. ELDREDGE BEACH, individually and as Director of the Florida Highway Patrol, Department of Highway Safety and Motor Vehicles,

ORDER AMENDING JUDGMENT

Defendants.

Before the court is defendants' motion to alter judgment (Document 112) to which plaintiff responded in Document 114. Defendants have alleged error in four areas of the memorandum opinion and order (Document 108). Each point is discussed below.

Qualified Immunity

The language of 42 U.S.C. §1983 is absolute and unqualified: "Every person who, under color of any statute . . . [or] custom . . ., of any State . . ., subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . ." Although the statutes itself embodies no immunities, courts have created a qualified immunity for public officials whose positions require the exercise of discretion in the performance of their duties. Scheuer v. Rhodes, 416 U.S. 232 (1974). The Scheuer Court held:

> [A] qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time

> of the action on which liability is ought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."

Id. at 247-48.

The next term the Supreme Court enunciated a two-pronged immunity standard which contained an objective test requiring reasonable grounds for the official's belief in the legality of the challenged conduct and a subjective test for good faith. Wood v. Strickland, 420 U.S. 308 (1975). The criterion for the objective prong is whether the official knew or reasonably should have known that the action he took within his sphere of official responsibility violated a basic, unquestioned constitutional right of his charge. Id. at 322. In the subjective

context, the public official will be found not to have acted in good faith if he took the action with the malicious intention to cause a deprivation of a constitutional right. Id.

In my memorandum opinion and order (Document 108) in this case, dated July 15, 1981, I found that defendants Beach and Davis lost their qualified immunity based on the objective test. Reasoning that Thurston v. Dekle, 531 F.2d 1264 (5th Cir. 1967) [sic] settled the exact procedures to protect an employee's property interest in his job, this court determined that Scherer's due process rights were clearly established at the time of his October 24, 1977 dismissal from the Florida Highway Patrol. Five days later, however, the Fifth Circuit affirmed Judge Higby's ruling in Weisbrod v. Donigan, TCA 79-813 (N.D. Fla. 1980), 651 F.2d 334 (5th Cir. 1981).

Unlike my conclusion, Judge Higby found that "[t]he right of a permanent state employee to a pre-termination conference was established as the result of a series of decisions which were rendered in late 1978." TCA 79-813, Document 46, p. 8. Judge Higby's Weisbrod opinion specifically rejected the determination that Thurston clearly established pre-termination due process procedures. The pertinent actions in Weisbrod occurred from June 17, 1977 through June 7, 1978, and yet the Fifth Circuit held that the "defendants did not act in disregard of any well-settled constitutional rights." 651 F.2d at 336.[1] Certainly it cannot be said that the Fifth Circuit was unaware of its own decision in Thurston. In fact, Circuit Judge Morgan was on both the Thurston and Weisbrod panels. Thus, the law of this circuit is that pre-termination due process

procedures were clearly established in late 1978; and accordingly that portion of Document 108 inconsistent with that holding must be vacated.

Although the issue of whether a clearly established constitutional right was violated must be resolved against plaintiff, defendants can take little comfort therein. Wood's duty to know well-settled constitutional rights only supplements the more general reasonable grounds requirement of Scheuer. If an official violates an employee's clearly established constitutional right, it is easier, but not the sole way, to find the official's behavior unreasonable.

Plaintiff suggests that this court should adhere to a recent Fifth Circuit decision which held that officials were not entitled to qualified immunity when they violated clearly established state law.

Williams v. Treen, 671 F.2d 892 (5th Cir. 1982). This court finds Williams partially persuasive. Significantly, the Fifth Circuit recognized the general "reasonable grounds" requirement enunciated in Scheuer when no well-settled constitutional right existed at the time of the challenged conduct. Id. at 897-900. This court, however, declines to follow the holding that "[i]f an official's conduct contravenes his own state's explicit and clearly established regulations, a subjective belief in the lawfulness of his actions is per se unreasonable." Id. at 899. Instead, this court is of the view that if an official violates his agency's explicit regulations, which have the force of state law, it is evidence that his conduct is unreasonable. The court however, must consider the totality of the circumstances. Scheuer, 416 U.S. at 247-48.

In the instant case, the Florida Highway Patrol adopted personnel rules and regulations which provided:

> Upon receiving a report of . . . a violation of Department or Division rules and regulations . . ., the Director shall order a complete investigation to determine the true facts concerning the circumstances surrounding the alleged offense. The completed investigation report will also contain a written statement made by the employee against whom the complaint was made. If after a thorough study of all information concerning the violation, the Director decides that a . . . dismissal will be in order, he will present the employee in writing with the reason or reasons for such actions.

General Order No. 43 § 1.C (September 1, 1977). This order was promulgated pursuant to section 120.53(1)(a) of the Florida Statutes, see Chapter 15B-11.14, Florida Administrative Code, and has the effect of statutory law. McDonald v. Department of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977).

Declaratory Relief

This court's memorandum opinion and order held:

> Section 110.061, Florida Statutes (1977) and its implementing rules are unconstitutional insofar as (1) they fail to mandate pre-termination procedures which safeguard the rights of employees, (2) they fail to provide a prompt post-termination hearing, and (3) they fail to guarantee back pay to an employee determined to have been dismissed without just cause.

Document 108, p. 23.

The Declaratory Judgment Act applies only in "a case of actual controversy," 28 U.S.C. §2201, and there is no actual controversy if a matter has become moot. Golden v. Zwickler, 394 U.S. 103 (1969). Moreover, there must be a controversy at the time the court acts. Id.; see also Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972).

The legislature repealed section 110.061 of the Florida Statutes in 1979.

During that same session, the legislature enacted section 110.227(5)(a) of the Florida Statutes which provides for constitutionally sufficient pre-termination procedures.

Additionally, defendants correctly note that by order dated June 13, 1980 (Document 72) this court held that plaintiff had no standing to complain of the unconstitutionality of Chapter 110, Florida Statutes on the basis of its failure to guarantee back pay for a wrongfully dismissed employee because Scherer had in effect settled his claim prior to his Career Service Commission hearing. Accordingly, that portion of the memorandum opinion and order declaring the statute unconstitutional for its failure to mandate pre-termination procedures which safeguard employees' rights and to guarantee back pay must be vacated.

In accordance with the foregoing, the final order in this case is amended and it is hereby ORDERED AND ADJUGED:

1. Plaintiff's claims herein for declaratory relief, compensatory relief other than lost wages, and punitive damages based on his October 20, 1977 termination from Career Service employment with the State of Florida are not barred by virtue of voluntary and knowing settlement of his Career Service Commission proceeding against the Department of Highway Safety and Motor Vehicles.

2. Chapter 110, Florida Statutes (1981) and its implementing rules are unconstitutional insofar as they fail to provide a prompt post-termination hearing.

3. Defendants' motion for directed verdict is granted with respect to plaintiff's claims in Count I of infringement of a constitutionally recognized

liberty interest and with respect to all of plaintiff's claims in Count II.

4. Defendants Ralph Davis and Col. J. E. Beach are not entitled to the qualified good faith immunity defense from liability for plaintiff's damages from his October 1977 termination from employment.

5. Plaintiff is entitled to four thousand two hundred dollars ($4200.00) in compensatory damages for his mental and physical pain and suffering.

6. Plaintiff's suspension of January 10, 1977 from Career Service employment, pending investigation of a charge of destruction of state property, did not offend the requirements of the due process clause of the fourteenth amendment.

7. Plaintiff's voluntary and knowing resignation of his Career Service employment, based on agreement of the Department of Highway Safety and Motor

Vehicles to abandon its investigation of charges against him of destruction of state property, constituted a waiver of his right of appeal pursuant to Section 110.061, Florida Statutes (1978 Supp.).

8. Plaintiff is entitled to his attorneys' fees and costs for litigation of the claims herein which were not barred by the prior settlement of his Career Service Commission proceeding. Plaintiff has ten working days from the date of this amended order to submit affidavits on attorneys' fees and costs to defendants. Defendants have ten working days to respond. Following such response, the parties have ten working days to negotiate a settlement of the amount to be awarded. If settlement cannot be made, the court will entertain a motion for said award.

9. The Clerk of this Court will amend judgment accordingly.

DONE AND ORDERED this 7th day of June, 1982.

/s/
WILLIAM STAFFORD
CHIEF JUDGE

FOOTNOTE:

1. In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) the Eleventh Circuit adopted Fifth Circuit precedent.

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF FLORIDA

GREGORY SCOTT SCHERER,

vs.

RALPH DAVIS, individually; CHESTER BLAKEMORE, officially as Director of the Department of Highway Safety and Motor Vehicles; and J. ELDREDGE BEACH, individually and as Director of the Florida Highway Patrol, Department of Highway Safety and Motor Vehicles,

AMENDED JUDGMENT

This action came on for trial (hearing) before the Court, Honorable William Stafford, Chief, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged

1. Plaintiff's claims herein for declaratory relief, compensatory relief other than lost wages, and punitive damages based on his October 20, 1977 termination from Career Service employment with the State of Florida are not barred by virtue of voluntary and knowing settlement of his Career Service Commission proceeding against the Department of Highway Safety and Motor Vehicles.

2. Chapter 110, Florida Statutes (1981) and its implementing rules are unconstitutional insofar as they fail to provide a prompt post-termination hearing.

3. Defendants' motion for directed verdict is granted with respect to plaintiff's claims in Count I of infringement of a constitutionally recognized liberty interest and with respect to all of plaintiff's claims in Count II.

4. Defendants Ralph Davis and Col. J. E. Beach are not entitled to the qualified good faith immunity defense from liability for plaintiff's damages from his October 1977 termination from employment.

5. Plaintiff is entitled to four thousand two hundred dollars ($4200.00) in compensatory damages for his mental and physical pain and suffering.

6. Plaintiff's suspension of January 10, 1977 from Career Service employment, pending investigation of a charge of destruction of state property, did not offend the requirements of the due process clause of the fourteenth amendment.

7. Plaintiff's voluntary and knowing resignation of his Career Service employment, based on agreement of the Department of Highway Safety and Motor Vehicles to abandon state property, [sic] constituted a waiver of his right of appeal

pursuant to Section 110.061, Florida Statutes (1978 Supp.).

8. Plaintiff is entitled to his attorneys' fees and costs for litigation of the claims herein which were not barred by the prior settlement of his Career Service Commission proceeding. Plaintiff has ten working days from the date of this amended order to submit affidavits on attorneys' fees and costs to defendants. Defendants have ten working days to respond. Following such response, the parties have ten working days to negotiate a settlement of the amount to be awarded. If settlement cannot be made, the court will entertain a motion for said award.

Dated at Tallahassee, Florida, this 14th day of June, 1982.

MARVIN S. WAITS,
Clerk of Court

By /s/
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5813
No. 83-3034
Non-Argument Calendar

GREGORY SCOTT SCHERER, Et Al.,

Plaintiffs-Appellees

versus

ROBERT GRAHAM, Et Al.,

Defendants-Appellants.

GREGORY SCOTT SCHERER, Et Al.,

Plaintiffs-Appellees,

versus

ROBERT GRAHAM, Et Al.,

Defendants-Appellants.

- - - - - - - - - - - - - - -

Appeals from the
United States District Court for the
Northern District of Florida

- - - - - - - - - - - - - - -

(June 30, 1983)

IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

GREGORY SCOTT SCHERER,

Plaintiff/Appellee,

vs. Case Nos. 82-5813
83-3034

RALPH DAVIS, et al.,

Defendants/Appellants.

_____/

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Ralph Davis, individually, Chester Blakemore, officially as Director of the Department of Highway Safety and Motor Vehicles, and J. Eldredge Beach, individually and as Director of the Florida Highway Patrol, Department of Highway Safety and Motor Vehicles, hereby appeal to the Supreme Court of the United States from the decision of this Court entered on June 30,

1983, and from the denial of Petition for Panel Rehearing entered on August 23, 1983, affirming the district court's order on the basis of the Memorandum Opinion and Order of the district judge.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

Respectfully submitted,

JIM SMITH
Attorney General

/s/
BRUCE A. MINNICK
Assistant Attorney General

/s/
VICKI GORDON KAUFMAN
Assistant Attorney General

Department of Legal Affairs
The Capitol, Suite 1501
Tallahassee, Florida 32301
(904) 488-1573

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Appeal to the Supreme Court of the United States has been furnished by United States Mail to BEN R. PATTERSON, 1215 Thomasville Road, Post Office Box 4289, Tallahassee, Florida 32303, this 31st day of August, 1983.

/s/